Supreme Court, U.S.
FILED
JAN 5 1998
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No. 97-852

In the

Supreme Court of the United States

October Term, 1997

EARL W. KAVANAU,
Petitioner,

v.

SANTA MONICA RENT CONTROL BOARD,
an Agency of the City of Santa Monica,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In accordance with Rule 15.6 of the United States Supreme Court Rules, petitioner Earl W. Kavanau files this reply brief to respond to additional issues raised by respondent in opposition to Mr. Kavanau's Petition for Writ of Certiorari.

This case squarely presents a plaintiff who has obtained a final judicial determination that he has suffered a temporary regulatory taking, but who has been denied his Fifth Amendment right to just compensation by the highest court of his state. The decision below forecloses just compensation to California plaintiffs who are subjected to regulatory takings so long as a due process remedy may be available, thereby forcing such plaintiffs to seek redress in federal court.

Respondent Santa Monica Rent Control Board (Rent Board) argues for the first time that the California Court of Appeal in *Kavanau v. Santa Monica Rent Control Board*, 19 Cal. App. 4th 730 (1993) (*Kavanau I*), established that Earl Kavanau "lost the takings issue and won the due process issue" and was therefore not entitled to just compensation.[1] This is a plain misrepresentation of the court of appeal's holding in that case, which established as a matter of law that Mr. Kavanau suffered an uncompensated regulatory taking of his property.

Similarly, the Rent Board argues for the first time that Mr. Kavanau is not entitled to just compensation in an inverse condemnation proceeding because he was not awarded compensation via an administrative writ.[2] This argument distorts and implicitly misrepresents California procedural law, under which just compensation for an as-applied regulatory taking can only be sought via an inverse condemnation claim joined with or subsequent to an administrative writ petition.[3] In fact, Mr. Kavanau's handling of this case has been singled out by the

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[1] Respondent's Brief in Opposition to Petition for Writ of Certiorari (Resp. Brief) at i.

[2] *Id.* at 2.

[3] *See Hensler v. City of Glendale*, 8 Cal. 4th 1, 21-28 (1994).

California Court of Appeal as a paradigm example of the correct way to pursue a regulatory takings claim under the procedures required by California law.[4]

ARGUMENT

I

THE CALIFORNIA COURT OF APPEAL IN *KAVANAU I* DETERMINED THAT THE RENT BOARD'S ACTIONS EFFECTED A REGULATORY TAKING FOR WHICH JUST COMPENSATION HAS NEVER BEEN PAID

The Respondent's Brief repeatedly misrepresents to this Court the holding of the California Court of Appeal in *Kavanau I*:

> [Petitioner] lost the takings issue and won the due process issue.[5]
>
> On appeal, the Court of Appeal reversed on the due process claim.[6]
>
> All three courts below . . . held that just compensation was not available because Petitioner had not suffered a taking.[7]
>
> Petitioner brought both a takings and due process claim, but succeeded solely on due process grounds.[8]

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[4] *See Santa Monica Beach v. Superior Court*, 50 Cal. Rptr. 2d 726, 732 n.3 (1996) (rev. granted May 29, 1996). A copy of the *Santa Monica Beach* opinion is reprinted as the Appendix to this brief.

[5] Resp. Brief at i.

[6] *Id.* at 2.

[7] *Id.* at 3.

[8] *Id.* at 11.

As the Appendix to the Respondent's Brief illustrates, Mr. Kavanau's petition in the trial court alleged that a common set of facts comprised both a taking and a due process violation, in recognition of the fact that the Takings Clause of the Fifth Amendment is applicable to the states only via the Due Process Clause of the Fourteenth Amendment.[9] These allegations were denied in their entirety by the trial court,[10] and that decision in turn was reversed in its entirety by the court of appeal.[11] There was no separate cause of action in the administrative writ petition for a due process violation, and nothing in the court of appeal's decision addresses the Due Process Clause independently of the Rent Board's violation of the Takings Clause.

In support of its revisionist reading of *Kavanau I*, the Rent Board now asserts that the court of appeal did not find the Rent Board had deprived Mr. Kavanau of economically viable use of his property.[12] Yet, in fact, that is precisely what *Kavanau I* established. This Court first enunciated the standard that a regulation effects a taking if it deprives an owner of economically viable use of his property in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In that seminal case, "economically viable use" was taken as synonymous with the owner's ability to earn a fair return on commercial real estate.[13] *Kavanau I* expressly found that "[i]t is not and could not be disputed that Kavanau could not obtain a fair return under the Board's approach."[14] Thus, contrary to the Rent Board's assertion, the court of appeal in *Kavanau I* established that Mr. Kavanau had suffered a regulatory taking under the analysis employed by this Court in *Penn Central*.

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[9] Appendix to Respondent's Brief (Resp. App.) at 4, ¶¶ 10a, 10b.

[10] Appendix to Petition for Writ of Certiorari (Pet. App.) at E-3.

[11] *Id.* at E-6.

[12] Resp. Brief at 7.

[13] *Penn Central*, 438 U.S. at 138 n.36.

[14] Pet. App. at E-8 n.7.

Finally, the Rent Board cites *Tibbs v. Florida*, 457 U.S. 31 (1982), for the proposition that this Court is bound by the California Supreme Court's mischaracterization of *Kavanau I* as a due process decision.[15] In fact, *Tibbs* holds that a court's *own* resolution of an ambiguity in a prior opinion *of the same court* should be taken as dispositive.[16] Thus, under *Tibbs*, any ambiguity as to whether *Kavanau I* found a taking was conclusively resolved when the same appellate panel subsequently cited to *Kavanau I* as having establishing a regulatory taking:

> [In *Kavanau I*] ***a taking was . . . determined in a judicial proceeding.***[17]

Thus, the Rent Board's assertions that *Kavanau I* was decided on due process grounds are contradicted both by the plain language of that opinion and by the court of appeal's subsequent assessment of its own decision. The California Supreme Court was presented with a final judicial determination that a regulatory taking had occurred, yet held that a compensation remedy was not available if a due process remedy could be devised.

II

JUST COMPENSATION WAS NOT AWARDED ON MR. KAVANAU'S ADMINISTRATIVE WRIT PETITION BECAUSE, UNDER CALIFORNIA'S PROCEDURAL SCHEME, THIS REMEDY MUST BE PURSUED VIA A FOLLOW-ON INVERSE CONDEMNATION ACTION

The Rent Board implies that Mr. Kavanau was not entitled to seek just compensation via inverse condemnation because "the sole remedy awarded by the Court of Appeal [in

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[15] Resp. Brief at 3 n.6.

[16] *Tibbs*, 457 U.S. at 46-47.

[17] *Santa Monica Beach*, 50 Cal. Rptr. 2d at 732 n.3 (emphasis added).

Kavanau I] was mandamus."[18] What the Rent Board does not point out, but is obvious from the Appendix to the Respondent's Brief, is that mandamus is the normal relief granted on the pleading Mr. Kavanau filed in the trial court--a Petition for Writ of Administrative Mandate.[19]

It is simply untrue that Mr. Kavanau "elected" to pursue his inverse condemnation claim concurrently with his administrative writ petition "but did not prevail," as the Rent Board falsely asserts.[20] As can be seen by examining the Appendix to the Respondent's Brief, no such concurrent claim was made. No inverse condemnation complaint was set out in the petition filed with the trial court in 1990, and no prayer for just compensation was set forth. Instead, in keeping with the procedures established by the California Supreme Court in *Hensler v. City of Glendale*,[21] Mr. Kavanau first established that the Rent Board had effected a taking via an administrative writ action and then sought just compensation by filing a subsequent inverse condemnation complaint.

The Rent Board distorts the Byzantine procedural obstacles California courts have placed in front of takings claimants to suggest that Mr. Kavanau's filing of a second complaint in this matter somehow indicates he must have done something wrong the first time. Yet, in fact, Mr. Kavanau complied to the letter with the onerous procedural requirements established by the California Supreme Court for prosecuting regulatory takings claims.

In a 1996 opinion, the California Court of Appeal expressly singled out the *Kavanau* litigation as a textbook example of correct procedure under existing California law:

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[18] Resp. Brief at 2.

[19] Resp. App. at 1.

[20] Resp. Brief at 11.

[21] 8 Cal. 4th at 21-28.

> Aside from potential problems created by the applicable statute of limitations, the property owner has the option of filing his administrative mandate petition first and then, if he prevails, pursuing his inverse condemnation claim in a separate action. For example, in *Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 Cal. App.4th 730, 23 Cal.Rptr.2d 724, we held that an apartment owner's petition for writ of mandate should have been granted on the ground that Santa Monica's rent control law, as applied to Mr. Kavanau, unconstitutionally deprived him of a fair return. *Assuming that Mr. Kavanau timely pursued a claim for inverse condemnation in a separate action, the trial court would then have before it a case in which a taking was already determined in a judicial proceeding and the only remaining issues would be whether that taking was the result of a regulation which did not meet the standards articulated in this opinion and, if it did not, the amount of damages to which Mr. Kavanau is entitled.*[22]

In short, the fact that Mr. Kavanau did not seek or receive just compensation in his initial administrative writ petition says nothing whatsoever about his constitutional right to be compensated once a taking was established in *Kavanau I*. The California Supreme Court confirmed this Fifth Amendment right in *Hensler* (providing rigorous procedural requirements are met) but snatched it away in the decision below.

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[22] *Santa Monica Beach v. Superior Court*, 50 Cal. Rptr. 2d at 732 n.3 (emphasis added, citations omitted).

III

THE CONFLICT BETWEEN THE CALIFORNIA SUPREME COURT AND THE NINTH CIRCUIT IS REAL AND SHOULD BE RESOLVED BY THIS COURT

The Respondent's Brief argues that there is no genuine conflict between the decision below and the Ninth Circuit Court of Appeals' holdings in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1994), *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996), and *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997).[23] However, the Rent Board's attempt to distinguish these cases rests wholly on the superficial factual distinction that none of the Ninth Circuit cases involved the application of a rent control ordinance.[24]

The Ninth Circuit has ruled unequivocally that due process complaints will be dismissed if they could be recharacterized as regulatory takings claims.[25] In contrast, the California Supreme Court in the decision below ruled that a plaintiff may not obtain a regulatory takings remedy if his complaint could be recharacterized as a due process claim.[26]

On the facts of this case, Mr. Kavanau would have a takings claim dismissed in state court because a due process remedy may be available and would have a due process claim dismissed in federal court because he could have alleged a taking. This is a classic example of the type of conflicting and inconsistent application of the law that should be resolved by action of this Court.

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[23] Resp. Brief at 10-12.

[24] *Id.* at 12 ("none of the three Ninth Circuit cases . . . held . . . that a due process remedy is not available in ratemaking [*sic*] cases").

[25] *See Armendariz*, 75 F.3d at 1318, 1325-26; *Patel*, 103 F.3d at 874-75; *Macri*, 110 F.3d at 1498-99.

[26] Pet. App. at A-20-21.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, petitioner respectfully asks that the petition be GRANTED.

DATED: January, 1998.

Respectfully submitted,

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APPENDIX

50 Cal. Rpt. 2d 726
Previously published at 42 Cal. App. 4th 1228

SANTA MONICA BEACH, LTD.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

SANTA MONICA RENT CONTROL BOARD,

Real Party in Interest.

No. B097056.

Court of Appeal, Second District, Division 1, California.

Feb. 27, 1996.

As Modified on Denial of Rehearing March 20, 1996.

Review Granted May 29, 1996.

Property owner filed combined complaint for inverse condemnation and petition for writ of administrative mandate, claiming city rent control ordinance was compensable regulatory taking of owner's property. The city rent control board demurred, claiming, as a matter of law, that property owner could not prevail on inverse condemnation claim. The Superior Court, Los Angeles County, No. SS005266, Alan B. Haber, J., sustained demurrer without leave to amend, but left administrative mandate petition for later determination. Property owner petitioned for writ of mandate, and Court of Appeal issued order to show cause. The Court of Appeal, Miriam A. Vogel, J., held that: (1) demurrer was improperly sustained, and (2) appropriate standard to apply in determining whether property owner had compensable regulatory taking claim was whether ordinance went too far by denying

owner economically viable use of land without substantially advancing reasonably *727 necessary and legitimate state interest.

Writ issued.

*728 Original Proceeding; application for writ of mandate, Alan B. Haber, Judge. Writ granted.

Pacific Legal Foundation, James S. Burling, R.S. Radford and Victor J. Wolski, for Petitioner.

No appearance for Respondent.

Anthony A. Trendacosta, General Counsel, Los Angeles, and Ralph H. Goldsen, Staff Attorney, San Francisco, for Real Party in Interest.

MIRIAM A. VOGEL, Associate Justice.

Santa Monica Beach, Ltd. (SMB) filed a combined complaint for inverse condemnation and petition for a writ of administrative mandate, naming the Santa Monica Rent Control Board as defendant and respondent and contending that, as applied to SMB, the City of Santa Monica's rent control law constitutes a compensable regulatory taking of SMB's property. The Board demurred, contending that, as a matter of law, SMB could not prevail on its inverse condemnation claim because there was a "rational basis" for the taking (that is, for the limits imposed by the rent control law). The trial court agreed and sustained the demurrer without leave to amend, leaving the administrative mandate petition to be heard at a later date. Because the two claims are inextricably related, SMB thereupon filed a petition for a writ of mandate, and we issued an order to show cause.

*729 For the reasons explained below, we conclude that the question is not one that can be decided by way of a demurrer--but that when it is properly before the trial court, the question is not whether there was a "rational basis" for the legislative enactment. Instead, the question is whether the statute "goes too far," which it does if (1) it denies an owner the economically viable use of its land without (2) substantially advancing a (3) reasonably necessary and (4) legitimate state interest, factors determined by the trial court's consideration of (a) the economic impact of the regulation on the owner,

(b) the extent of the interference with the owner's reasonable investment-backed expectations, (c) the character and nature of the regulation, (d) the extent (if any) to which the owner benefits from the regulation, and (e) the nature and importance of the public interests which the regulation serves.

BACKGROUND[1]

A.

In April 1979, the City of Santa Monica adopted a rent control charter amendment and created an elected Rent Control Board to regulate rentals. Among other things, the City's rent control law requires that owners register each rental unit and pay annual registration fees to the Board, establishes maximum allowable rents, provides for annual general adjustments and individual adjustments of allowable rents, prohibits evictions except for specified reasons, and prescribes remedies for violations of its provisions.

This was the stated purpose of the charter amendment: "A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. *These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens*. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return." (Emphasis added.)

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[1] As always, on review of the propriety of a ruling on a demurrer, we presume the truth of the complaint's properly pleaded facts. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Statements of fact within quotation marks are taken from SMB's first amended complaint.

Between 1980 and 1990, during which time the City's rent control law was continuously in effect, the City's stock of rental housing units declined by nearly 5 percent and the City experienced a loss of 775 low-income rental units (a 12 percent decline) notwithstanding that, during the same period, the rental housing supply and the number of low-income rental units *increased* in all comparable non-rent-controlled Southern California cities. The City also lost 285 "very low-income" rental units, the largest "exodus of economically disadvantaged renters" from *any* comparable Southern California city. At the same time, the City experienced a 37 percent *increase* in the proportion of households with very high incomes (while the proportion of very high-income households *dropped* by more than 8 percent in Los Angeles County as a whole). In addition, rental housing in Santa Monica has become "increasingly unavailable" to young families, with the number of family households with children declining by 1,299, a 6 percent drop during a period when no comparable non-rent-controlled Southern California city lost young family households.

"The impact of rent control has been especially harsh on young families headed by a mother with no spouse. The number of female-headed households with children under 18 in Santa Monica fell by 593 between 1980 and 1990, a decrease of more than 27 [percent], despite an *increase* in such households in Los Angeles County as a whole. ¶ Under rent control, Santa Monica's elderly population (aged 65 and over) declined by 1.7 [percent] between 1980 and 1990. This decrease ***730** is especially remarkable because the elderly population of Los Angeles County *rose* by more than 15 [percent] over the same decade. The elderly population increased over this period in every comparable [Southern California] city without rental control . . . ."

In short, SMB alleges, Santa Monica's rent control law has failed to mitigate the effects of "a growing shortage of housing units" by assisting "the poor, minorities, students, young families and senior citizens" and, to the contrary, it has made things worse.

B.

In March 1992, SMB (the owner of a 12-unit residential rental property in the City of Santa Monica) filed a petition asking the Board for permission to increase its rents. To prevail, SMB had to prove that its property was producing less than a "fair return" under "a

comparative Net Operating Income (NOI) analysis that compares the NOI of calendar year 1978 to that of calendar year 1991, the most recent year prior to the filing of" SMB's 1992 petition. In May, after an administrative hearing, the Board's hearing examiner found that SMB's operating expenses for the base year of 1978 were $14,879 but that SMB was not entitled to a rent increase. SMB appealed to the Board, without success.

While SMB's 1992 petition was pending, three things happened. First, SMB (along with all Santa Monica landlords covered by the City's rent control law) became entitled to a "full general rent adjustment" effective September 1, 1992. Second, the Board modified its regulations so that, in the future (but not retroactively), a landlord's operating expenses could be calculated by separating insurance costs from other administrative management costs. Third, the Board "extensively modified" Regulation 4108 which, as originally adopted, had *temporarily delayed* implementation of general rent adjustments in cases where owners received large rent increases. The revised Regulation 4108, as adopted on June 3, 1992, *permanently denies* up to one year of future general rent adjustments in the event an owner is entitled to *any* rent increase, no matter how small the amount.

On March 30, 1993, SMB filed a second petition with the Board, this time asking for permission to increase its rents based upon its income and expenses for 1992. A hearing examiner found that SMB was entitled "to a permanent rent increase of $3 per unit per month and temporary rent increases averaging $58 per unit per month." SMB appealed to the Board, contending (1) the hearing officer had improperly considered income from parking spaces rented separately from SMB's apartments (parking spaces are not covered by the City's rent control law), (2) the hearing examiner's determinations were contrary to the determinations made by the hearing examiner who heard SMB's 1992 petition, and (3) the hearing examiner improperly applied Regulation 4108 to reduce SMB's rent increase entitlement based on SMB's 1992 NOI and to permanently deny SMB three-fourths of the general rent adjustment to be implemented in 1993 and 1994. The Board affirmed the hearing examiner's determinations.

Based upon these allegations, SMB claims the Board has, by application of the City's rent control law, violated SMB's Fifth

Amendment rights under the United States Constitution and its rights under article I, section 19 of the California Constitution (the takings clauses). Specifically, SMB claims the City's rent control law does not meet the "substantial advancement" test articulated in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 834-837 (discussed at length below), because the rent control law fails "to substantially mitigate some social harm that would otherwise result from the [property] owner's unregulated use of [its] property" and by "fail[ing] in practice to advance the specific purpose stated in the regulation."

In its cause of action for inverse condemnation, SMB then alleges: "Because [the Board's] application of the [rent control law] has reduced the availability of private rental housing in Santa Monica and has made it more difficult for low-income renters, young families, and the elderly to find affordable rental housing, the [rent control law] is not *731 substantially advancing its stated purpose of implementing the housing policies of the [C]ity with regard to these population groups. ¶ The . . . Board's final determination regarding [SMB's 1993 petition] does not substantially advance a legitimate governmental interest, nor is there any close nexus between the denial of [SMB's] application for a fair rate of return on capital investments and any public harm that might result from [SMB's] unregulated operation of [its] property, because unregulated use of [its] property by [SMB] would not have resulted in the problems allegedly addressed by the [rent control law], i.e., a shortage of available housing for low-income renters, young families, and the elderly."

Additional allegations within the inverse condemnation cause of action charge the Board with denying SMB a fair return on its investment and depriving SMB of "essential attributes of ownership of its property, including the right to exclude others and the right to determine the terms upon which leasehold interests in [SMB's] property will be alienated." SMB "has received no compensation for the damages inflicted by [the City's] application of the [rent control law] to [SMB's] property, and the [rent control law] contains no provision for seeking or obtaining compensation."

For each and all of these reasons, SMB alleges, the Board's application of the City's rent control law to SMB's property "comprises a regulatory taking of [SMB's] property for public use without just

compensation . . . . ¶ A trial de novo is necessary to examine the constitutional issues in this case. The administrative record compiled by the Rent Board is inadequate for this purpose because the Rent Board does not conduct the kind of judicial proceedings needed to safeguard [SMB's] fundamental right to due process of law or its right not to be deprived of its property without just compensation. . . ."[2]

C.

The Board demurred to SMB's inverse condemnation cause of action, contending (among other things) that the rent control law need not "substantially advance" the stated purpose of the law and that where, as here, a regulatory taking is alleged, this "heightened scrutiny" is not required. Moreover, claimed the Board, an inverse condemnation claim cannot be based upon a "temporary regulatory diminution of income or value." In short, the Board's position was (and is) that, as a matter of law, SMB has no right to claim damages on an inverse condemnation theory.

The trial court accepted the Board's position and sustained the demurrer without leave to amend because "the rational basis test applies to regulatory takings." An order dismissing SMB's inverse condemnation cause of action was thereafter signed and filed, leaving SMB with its petition for administrative mandate still to be determined. Because the two claims are inextricably related, SMB asked us to intervene and review the trial court's ruling at this stage of the proceedings. We agreed and issued an order to show cause, to which the Board has responded. For the reasons we will now explain, we grant the writ as prayed.

DISCUSSION

I.

We begin by stating the obvious. First, all it takes to plead a cause of action for inverse condemnation are allegations of (1) the plaintiff's

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[2] As noted at the outset, SMB's complaint is combined with a petition for a writ of administrative mandate. That cause of action (which is not before us at this time) alleges with specificity that the Board acted without or in excess of its jurisdiction in denying SMB's request for permission to increase its rents.

ownership of described property, (2) a governmental taking by actual possession or by regulation, and (3) substantial damage to the plaintiff's property. (5 Witkin, Cal.Procedure (3d ed. 1985) Pleading, § 641, pp. 91-92.) Second, where (as here) the existence of a regulatory taking has not previously been judicially determined, an action for inverse condemnation is properly joined with a petition for a writ of administrative mandate. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7, 13-16).[3] *732 Third, by its demurrer, the Board has conceded (for present purposes) the truth of SMB's factual allegations and we

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[3] Aside from potential problems created by the applicable statute of limitations (as in *Hensler v. City of Glendale, supra*, 8 Cal.4th at pp. 21-28), the property owner has the option of filing his administrative mandate petition first and then, if he prevails, pursuing his inverse condemnation claim in a separate action. For example, in *Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 Cal. App.4th 730, we held that an apartment owner's petition for writ of mandate should have been granted on the ground that Santa Monica's rent control law, as applied to Mr. Kavanau, unconstitutionally deprived him of a fair return. Assuming that Mr. Kavanau timely pursued a claim for inverse condemnation in a separate action, the trial court would then have before it a case in which a taking was already determined in a judicial proceeding and the only remaining issues would be whether that taking was the result of a regulation which did not meet the standards articulated in this opinion and, if it did not, the amount of damages to which Mr. Kavanau is entitled. (*Hensler v. City of Glendale, supra*, 8 Cal.4th at pp. 13-17 [a regulatory taking may be challenged by declaratory relief or by a petition for a writ of administrative mandate, either of which may be joined with or followed by an action for inverse condemnation]; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal. App.4th 592, 607 [where an inverse condemnation action is based upon a regulatory taking accomplished by a discretionary action of an administrative agency, "the proper procedure is to bring the inverse condemnation action in conjunction with, or after, a petition for administrative mandamus, . . . the procedure generally required when the validity or propriety of an action or determination by an administrative agency is challenged"]; *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1170.)

therefore presume there has, in fact, been a regulatory taking of SMB's property, the extent of which remains to be determined at trial. (*Moore v. Regents of University of California, supra*, 51 Cal.3d at p. 125; *Lacher v. Superior Court* (1991) 230 Cal. App.3d 1038, 1043[in ruling on a demurrer, the trial court is prohibited from considering whether the plaintiff will be able to prove its claim or the difficulty it may have in doing so].) Fourth, a partial or temporary regulatory taking is still a "taking" which will support an inverse condemnation claim. (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321; *Healing v. California Coastal Com., supra*, 22 Cal.App.4th at p. 1171.)

For these reasons, it is clear the demurrer was improperly sustained. In short, the question whether the facts alleged by SMB are sufficient to establish the sort of regulatory taking which will entitle it to damages on an inverse condemnation theory was not something the trial court could or should have answered at this stage of the proceedings.

II.

Since the trial court's comments (as well as its ruling) reflect its uncertainty about the standard ultimately to be applied in this case, and since we have the issue squarely before us and fully briefed by both sides, we have concluded that this is an appropriate stage of these proceedings at which to address the merits of this issue.

A.

To the extent the Board contends that not every governmental regulation supports a taking claim, it is correct. To the extent it contends that all that is required is some vague, unarticulated rational connection between the regulation and the limitation on a property owner's rights vis-à-vis its property, the Board is wrong. If SMB can prove that Santa Monica's rent control law "goes too far" in the manner explained below, SMB will have established the "taking" element of its inverse condemnation cause of action--notwithstanding that the City may be able to show that there was a "rational basis" for the law when it was adopted.

B.

As our Supreme Court explained in *Hensler v. City of Glendale*, *supra*, 8 Cal.4th at pages 9-10 (quoting *Yee v. Escondido* (1992) 503 U.S. 519, 522-523), a regulatory taking differs from the classic physical invasion of private property that historically formed the basis of ***733** an inverse condemnation claim: "'Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. [Citation.] But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.'"[4]

Where (as in our case) the inverse condemnation claim is based upon a regulatory taking, "[a]n individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on property use constitutes a compensable taking." (*Hensler v. City of Glendale*, *supra*, 8 Cal.4th at p. 10.) In short, the determination whether a regulatory taking is compensable is fact-driven and must be decided on a case by case basis. (*Id.* at p. 12 [compensation need not be paid unless the regulation fails to serve an important governmental purpose or goes too far as applied to specific property]; *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 [while property may be regulated to a certain extent, if the regulation "goes too far" it will be recognized as a taking]; see also *MacDonald, Sommer &*

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[4] As the Supreme Court explained in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, there are really three categories of takings: (1) an outright physical taking (e.g., flooding, destruction or physical occupation by government); (2) physical taking by regulation (e.g., regulatory measures authorizing permanent physical use of property by third parties); and (3) pure regulatory takings (i.e., regulations prohibiting or requiring certain uses of property by its owner). The first two categories always require compensation. As we will explain, the determination whether the third category constitutes a compensable taking depends on the facts of each case.

Frates v. Yolo County (1986) 477 U.S. 340, 348 [a court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes].)

C.

How do we determine whether a regulation "goes too far?"[5] We know that it does *not* go too far if it "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 834, citing *Agins v. Tiburon* (1980) 447 U.S. 255, 260.) Conversely, we know that it *does* go too far if it is "not reasonably necessary to the effectuation of a substantial government purpose." (*Nollan v. California Coastal Comm'n. supra,* 483 U.S. at p. 834, citing *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 127.)

In *Nollan*, the question was whether the California Coastal Commission could require an applicant for a building permit to dedicate part of his land as an easement for public access to the beach. (*Nollan v. California Coastal Comm'n*, supra, 483 U.S. at p. 834.) Since the Supreme Court concluded that such a permit condition could not pass constitutional muster under *any* standard, it was unnecessary for the Court to articulate the precise test to be applied to determine when a regulation "goes too far." But the Supreme Court did use Nollan to *expressly reject* the Coastal Commission's contention that the test for a "taking" is whether the state, in the exercise of its police power, "could rationally have *734 decided" the permit condition

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[5] The Supreme Court did not consider this issue in *Hensler*. There, the distinction between possessory and regulatory takings was necessary to determine the nature of the plaintiff's claim, a prerequisite to the determination of the time at which the applicable statute of limitations runs when the challenge is to the facial validity of a land-use regulation (the answer on the facts of *Hensler* was that it runs from the date the statute became effective). (*Hensler v. City of Glendale, supra,* 8 Cal.4th at p. 22.) Thus, although *Hensler* provides the framework for our discussion, it does not answer the specific issue raised by SMB's petition.

might achieve the state's objective. (*Ibid.*) That, at least, disposes of the "rational basis" test adopted by the trial court in our case.

In our view, *Nollan* left in place the tests previously articulated in *Agins v. Tiburon, supra*, 447 U.S. at p. 260, and *Penn Central Transp. Co. v. New York City, supra*, 438 U.S. at pp. 125-127. What this means is that a statute "goes too far" and thus supports a compensable regulatory taking claim if (1) it denies an owner the economically viable use of his land without (2) substantially advancing a (3) reasonably necessary and (4) legitimate state interest, issues to be determined by the trial court's consideration of (a) the economic impact of the regulation on the owner, (b) the extent of the interference with the owner's reasonable investment-backed expectations, (c) the character and nature of the regulation, (d) the extent (if any) to which the owner benefits from the regulation, and (e) the nature and importance of the public interests which the regulation serves.

In *Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, 169-171, Division Three of the First District held that "any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases." As our Supreme Court recently explained, however, while "[t]here is no question that the takings clause is specially protective of property against *physical occupation* or invasion," and no question that the government "generally has greater leeway with respect to noninvasive forms of land use regulation" where the "'extortionate' use of the police power to exact unconstitutional conditions is not present," *Blue Jeans* must be limited to its facts and where (as here) it is alleged that a monetary exaction is imposed "on an individual and discretionary basis, . . . the heightened standard of judicial scrutiny of *Nollan* and *Dolan [v. City of Tigard* (1994) 512 U.S. ___ [129 L.Ed.2d 304, 317]] is triggered." (*Ehrlich v. City of Culver City* (Mar. 5, 1996, S033642) ___ Cal.4th ___ [slip opn., pp. 24-25].)[6] While we do not question the basic rule

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[6] In *Dolan*, a case involving conditions imposed upon a property owner who wanted to double the size of her retail store and pave over her parking lot, the Supreme Court held that, to avoid a "taking" claim, the City of Tigard would have to demonstrate not only (1) that an *essential nexus* existed between the legitimate state interests involved and the

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that not every regulation results in a compensable taking, we believe the trend toward more far-reaching (and numerically more) socially engineered land-use regulations supports our interpretation of *Nollan* and our conclusion that its rules apply to the type of regulatory taking at issue in this case. And although *Blue Jeans* as written might arguably have supported a different conclusion, the manner in which it has been construed by the Supreme Court makes it entirely consistent with the result we reach in this case.[7]

III.

If, at trial, SMB is able to establish that Santa Monica's rent control law "goes *735 too far," the fact that rent control ordinances

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[6] (...continued)
permit conditions (a requirement previously imposed by *Nollan*), but also (2) that there was a *rough proportionality* between the exactions and the projected impact of the proposed development. (*Dolan v. City of Tigard, supra*, 512 U.S. at p.__ , [129 L.Ed.2d at pp. 317-320].) In *Yee v. Escondido, supra*, 503 U.S. at pp. 533-538, where several mobilehome park owners challenged a mobilehome park rent control ordinance as a regulatory taking, the Supreme Court refused to decide the issue now before us because it had not been raised below but suggested, in dicta, that the analysis would be whether there was "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."

[7] When we filed this opinion, *Ehrlich* was still pending before the Supreme court. After the Supreme Court filed *Ehrlich*, the Board filed a petition for rehearing in which it suggested that our opinion was inconsistent with *Ehrlich*. We disagree. *Ehrlich* applies the heightened scrutiny test of *Nollan* and *Dolan* to a monetary exaction imposed by a city as a condition of approving a rezoning request and expressly rejects the suggestion that "the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies *only* to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval." (*Ehrlich v. City of Culver City, supra*, --- Cal.4th at p.__, [slip opn. at p.2.].) Thus, to the extent *Ehrlich* addresses the issue now before us, it is entirely consistent with the result we reach.

have been upheld against facial constitutional challenges (e.g., *Pennell v. San Jose* (1988) 485 U.S. 1; *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184; *Yee v. Escondido, supra*, 503 U.S. 519; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165) does not preclude a finding that Santa Monica's ordinance is unconstitutional as applied to SMB. (*Pennell v. San Jose, supra*, 485 U.S. at pp. 10-11; cf. *Healing v. California Coastal Com., supra*, 22 Cal.App.4th at pp. 1166-1168.)

For the record, we note that if SMB can prove what it has pleaded, it would win even on the "rational basis" test rejected in *Nollan*. If, in fact, Santa Monica's rent control law has reduced rather than increased the number of rental units available to those intended to be benefited by that law, then the regulation has no relationship (nexus) at all to its stated purpose. Deference to legislative authority cannot salvage a regulation that defeats rather than accomplishes its stated purpose. As was said in *Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 296, and adopted by us in *Kavanau v. Santa Monica Rent Control Bd., supra*, 19 Cal.App.4th at p. 736, "the purpose of rent control is not to make the landlord a private guarantor of affordable housing for tenants, nor is it to bring about such a degree of decreased maintenance and services as to diminish the quality of housing available. The purpose of rent control is to permit an efficient landlord to pay all actual and reasonable expenses and receive a fair profit while, at the same time, protecting the public interest in having affordable and properly maintained rental housing available to the citizens of the community."[8]

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[8] In *McDougal v. County of Imperial* (9th Cir.1991) 942 F.2d 668, 676, the Ninth Circuit rejected the notion that "any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property . . . . [W]e believe that a court is required to consider the nature as well as the legitimacy of the state's interest together with the nature and extent of its impact on the owner's use of his land." In *Healing v. California Coastal Com., supra*, 22 Cal.App. 4th at p. 1174, we explained that, "[t]o resolve this issue, evidence must

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And, as one commentator put it, "[w]ith the possible exception of a short-term response to a wartime emergency, the traditional objectives of rent control are highly vulnerable to attack under *Nollan's* substantial advancement test. Responding to housing shortages or redistributing wealth may be regarded as legitimate state interests, but rent control generally fails to substantially advance these goals. Conversely, the political objectives that are furthered by rent control are of dubious legitimacy . . . ." (R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control* (1992) 21 Sw.U.L.Rev. 1019, 1065, fns. omitted.)

The bottom line, therefore, is this: If SMB establishes (as it has alleged) that Santa Monica's rent control law "goes too far" as applied to SMB, SMB will have established a compensable regulatory taking.[9]

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[8] (...continued)
be considered." Quoting *McDougal*, we continued: "'The legitimacy of the public interest involved, how much it is furthered by the regulatory actions at issue, the extent of the public benefit obtained or expected, and the degree that the [owner's] property rights and reasonable investment-backed expectations have been impaired are all factors which lie at the heart of the takings inquiry. These things typically cannot be assessed properly without a factual record.'" (*Healing v. California Coastal Com., supra*, 22 Cal.App.4th at p. 1174, quoting *McDougal v. County of Imperial, supra*, 942 F.2d at p. 680.)

[9] In its return to SMB's petition, the Board contends that SMB's inverse condemnation complaint is barred by the applicable statute of limitations and by SMB's failure to exhaust administrative remedies. By implication, the trial court rejected these arguments when it sustained the Board's demurrer solely on the ground discussed in this opinion. Since these are fact-based issues which could not, in any event, be determined by demurrer, the trial court's order cannot be sustained on either of these alternative grounds. Because these and perhaps other issues not raised in these writ proceedings remain to be determined, our disposition refers to "if" and when this case is tried (rather than assuming it absolutely will be tried).

***736. DISPOSITION**

Let a peremptory writ issue commanding the trial court (1) to vacate its orders sustaining the Board's demurrer to SMB's inverse condemnation action and dismissing that portion of SMB's complaint; (2) to enter a new order overruling the Board's demurrer and directing the Board to answer within the time specified by the trial court; and (3) if and when SMB's inverse condemnation action is tried, to determine the taking issue according to the standard articulated in this opinion.

ORTEGA, Acting P.J. and MASTERSON, J., concur.